IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PROVIDENCE SERVICE CORPORATION,	)
Plaintiff,	)
v.	) C.A. No. N18C-06-114 MMJ CCLD
ILLINOIS UNION INSURANCE COMPANY,	)
Defendant.	)

Submitted: June 12, 2019
Decided: July 9, 2019

Upon Plaintiff's Motion for Partial Summary Judgment
GRANTED

Upon Defendant's Cross-Motion for Summary Judgment
DENIED

OPINION

Kenneth J. Nachbar, Esq., John P. DiTomo, Esq., Sabrina M. Hendershot, Esq., Morris, Nichols, Arsht, & Tunnell LLP, Wilmington, Delaware; Robin L. Cohen, Esq., Adam S. Ziffer, Esq. (Argued), Michelle R. Migdon, Esq., Kelly A. Jauregui, Esq., McKool Smith P.C., New York, New York, *Attorneys for Plaintiff*

Joseph J. Bellew, Esq., White & Williams LLP, Wilmington, Delaware; Deborah M. Minkoff, Esq. (Argued), Abby J. Sher, Esq., Cozen O'Connor, Philadelphia, Pennsylvania, *Attorneys for Defendant*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This action seeks to recover defense costs incurred in connection with two separate actions. Plaintiff Providence Service Corporation has alleged breach of contract and is seeking a declaratory judgment, pursuant to 10 *Del. C.* § 6501 *et seq*. Plaintiff alleges that Defendant Illinois Union Insurance Company breached its obligations under the "follow form" Healthcare Facilities Concurrent Excess Liability Policy (the "Policy") that it sold to Plaintiff. Plaintiff alleges that the Policy provides coverage for liabilities, including the costs of defense, incurred in connection with "private probation management or correction services."

Plaintiff owns Pathways Community Corrections, Inc. ("PCC"), an additional insured under the Policy. PCC administered the Rutherford County, Tennessee misdemeanor probation system, which involves the collection of court costs and fees from probationers. In 2015, PCC was sued in a class action lawsuit in the United States District Court for the Middle District of Tennessee (the "*Rodriguez* Action"). The *Rodriguez* Action alleged that PCC illegally assessed fees and surcharges against probationers, and made improper threats of arrest and

probation revocation if the probationers did not pay the assessed amounts. The class challenged the constitutionality of PCC's services. The parties reached a settlement agreement. According to the Complaint, Plaintiffs incurred millions of dollars in defense costs in connection with the *Rodriguez* Action. After the primary insurer paid for PCC's defense costs, Defendant has refused to pay for the excess loss.

Defendant argues that coverage is barred under the Policy's Prior Acts or Prior Notice Exclusion (the "Exclusion"). The Exclusion states:

> This insurance does not apply to
>
> 1. Any "professional incident" or "related professional incident" that took place on or before the Effective Date of [the Policy], if the corporate risk manager or the risk management department on the Effective Date knew or could have reasonably foreseen that such "professional incident" or "related professional incident" might be expected to give rise to a "professional liability claim or;
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> 2. Any "professional incident" or "related professional incident" which has been the subject of any written notice given to a prior insurer on or before the Effective Date of this policy.[1]

Defendant argues that the *Rodriguez* Action is "related," for purposes of the Exclusion, to another class action (the "*Bell* Action"). The *Bell* Action was filed

[1] ACE Primary Policy, Professional Liability Coverage Part, § V(A).

five years prior to the *Rodriguez* Action. The *Bell* Action originally focused on two specific fees charged by PCC: a picture fee, and a supervisory fee. The complaint was later amended to include a 42 U.S.C. § 1983 allegation. The *Bell* Action settled in 2011.

Defendant argues that the *Rodriguez* Action is "related" to the *Bell* Action. Defendant argues that the Actions share "many common facts, circumstances, and decisions." Defendant argues that because the Actions are "related" under the Policy, Defendant is not obligated to pay defense costs related to the *Rodriguez* Action. Plaintiff moved for partial summary judgment, claiming that the two Actions are not "related" and that Plaintiff is entitled to coverage. Defendant moved for summary judgment on the basis that the *Rodriguez* Action is excluded from coverage under the Policy.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a

[2] Super. Ct. Civ. R. 56(c).
[3] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

ANALYSIS

Choice of Law

Absent an express choice-of-law provision, the Court must determine whether there is an actual conflict between the laws of different states that could potentially apply to a given contract.[7] If there is no actual conflict between Delaware law and that of any other relevant jurisdiction, then "there is a 'false conflict,' and the Court should avoid the choice-of-law analysis altogether" by applying Delaware law.[8]

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[4] Super. Ct. Civ. R. 56(c).
[5] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[7] *Travelers Indem. Co. v. CNH Indus. Am.*, 2018 WL 3434562, at *3 (Del.); *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017).
[8] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010)(citing *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3rd Cir. 2006)); *Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *9 (Del. Super.).

The Court finds that there is no actual conflict between Delaware law and any relevant jurisdiction. Therefore, the Court will not engage in a choice-of-law analysis and will apply Delaware law.

Insurance Contract Interpretation

When interpreting policy language, Delaware courts look to the ordinary meaning as viewed by an average reasonable insured, consistent with an insured's reasonable expectation of coverage.[9] Exclusionary language is viewed strictly and narrowly. Any ambiguity in the policy language must be resolved against the insurer that drafted the policy and in favor of coverage.[10]

Related Professional Incidents

The Policy states:

> "All 'professional liability claims' by the same person that arise out of the same 'professional incident' or 'related professional incidents' will be considered to have been made at the time the first of those 'Professional liability claims' or 'professional liability incidents' have been reported to us."[11]

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[9] *See Med. Depot, Inc. v. RSUI Indem. Co.*, 2016 WL 5539879, at *7 (Del. Super.); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388-89 (D. Del. 2002); *Teufel v. Am. Family Mut. Ins. Co.*, 419 P.3d 546, 549-50 (Ariz. 2018).

[10] *See Med. Depot*, 2016 WL 5539879, at *7; *Alstrin*, 179 F. Supp. 2d at 389, 390; *Teufel*, 419 P.3d at 548.

[11] Amendment to Insuring Agreement – Endorsement 55, Paragraph A.

Defendant refers to this clause as a deemer clause. Plaintiff calls it an exclusion. However, that distinction is not relevant for purposes of this analysis. The above section does not exclude coverage. Defendant agrees that the *Bell* Action and the *Rodriguez* Action do not involve claims made by the "same person." Whether or not the two Actions are "related" is disputed.

Actions may be "related" when they involve "fundamentally identical" claims.[12] Courts have found that merely sharing common facts and events does not necessarily mean that actions are "related" for purposes of allowing or denying coverage.[13]

The Policy defines "related professional incidents" as follows:

DEFINITIONS

*** * ***

> **Z**. "Related professional incidents" means "professional incidents" that are logically or causally connected to each other by any common fact, circumstance, situation, transaction, event, advice or decision.[14]

The Exclusion provides:

This insurance does not apply to

[12] *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *11 (Del. Super.).
[13] *See Medical Depot, Inc. v. RSUI Indemnity Company*, 2016 WL 5539879, at *14 (Del. Super.).
[14] General Policy Provisions – General Liability and Professional Liability Coverage.

1. Any "professional incident" or "related professional incident" that took place on or before the Effective Date of [the Policy], if the corporate risk manager or the risk management department on the Effective Date knew or could have reasonably foreseen that such "professional incident" or "related professional incident" might be expected to give rise to a "professional liability claim or;

2. Any "professional incident" or "related professional incident" which has been the subject of any written notice given to a prior insurer on or before the Effective Date of this policy.[15]

When determining whether actions are "related," courts compare the allegations in the complaints to determine their similarities and differences.[16] The key similarities and differences between the *Bell* and *Rodriguez* Actions include the following:

- The *Rodriguez* Action was a class action, and the *Bell* Action involved a proposed class. The *Bell* Action settled before the class was certified. However, both Actions involved plaintiff probationers.

[15] ACE Primary Policy, Professional Liability Coverage Part, § V(A).

[16] *See Med. Depot*, 2016 WL 5539879, at *5 (parties stipulated to stay discovery prior to filing summary judgment motions addressing relatedness); *RSUI Indemnity Company v. Sempris, LLC*, 2014 WL 4407717, at *1, 4-5 (summarizing allegations of complaints in prior and current lawsuits); *Glascoff v. OneBeacon Midwest Ins. Co.*, 2014 WL 1876984, at *7 & n.5 (S.D.N.Y.)(finding claims not interrelated at pleading stage and noting that further discovery and factual development not needed); *Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 629 Fed. App'x 38, 41 (2d Cir. 2015)(approving of side-by-side review of complaints to determine relatedness); *First Horizon Nat'l Corp. v. Houston Cas. Co.*, 2017 WL 2954716, at *16 (W.D. Tenn.)(looking at four corners of complaints to decide that two lawsuits not related).

- The wrongful conduct alleged in both Actions involved PCC's assessment of unauthorized fees accompanied by threats if those fees were not paid.
- Both Actions sought relief under 42 U.S.C. § 1983.
- The *Bell* Action involved plaintiffs who were placed on probation for any offense who were subjected to the wrongful conduct specifically alleged, including payment of fees.
- The *Rodriguez* Action involved individuals who incurred court-ordered costs due to traffic or misdemeanor offenses and were subsequently subject to probation.
- The *Bell* Action sought relief under the Consumer Protection Act, Fair Debt Collection Practices Act, and common law fraud, negligence, and intentional misrepresentation.
- The *Rodriguez* Action sought relief under the Due Process and Equal Protection Clauses, the Tennessee State Constitution, and common law abuse of process.
- The *Bell* Action sought an injunction, while the *Rodriguez* Action sought damages and court orders.

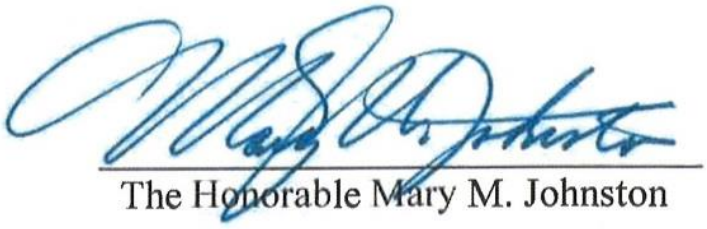
As a general matter, any challenges to the provision of probationary services can be "related," but the analysis cannot stop there. To accept Defendant's broad definition of "related" would render all claims involving PCC professional services "related." Coverage would be illusory. It would be difficult, if not impossible, to find unrelated incidents in the context of providing probationary services.

The Court finds that the professional incidents in the *Bell* Action and the *Rodriguez* Action are not "related" for purposes of the Prior Acts or Prior Notice Exclusion. The similarities between the two Actions are outweighed by their differences. There are significant differences between the two Actions. The *Bell* Action was based on a breach of contract. The *Rodriguez* action raised constitutional challenges, including the disparate treatment of indigent probationers. The *Bell* Action settlement was narrow, while the *Rodriguez* Action settlement was broad. The *Bell* Action sought an injunction. The *Rodriguez* Action sought millions of dollars in damages.

CONCLUSION

The Court finds that the professional incidents in the *Bell* Action and the *Rodriguez* Action are not "related" for purposes of the Prior Acts or Prior Notice Exclusion. **THEREFORE**, Plaintiff's Motion for partial Summary Judgment is **hereby GRANTED**. The Court declares that the Prior Acts or Prior Notice Exclusion does not exclude coverage for the *Rodriguez* Action settlement, and Illinois Union's Fourth Affirmative Defense and First Counterclaim are **hereby DISMISSED**. Defendant's Cross-Motion for Summary Judgment is **hereby DENIED**.

IT IS SO ORDERED.



The Honorable Mary M. Johnston